Supreme Court, U.S.
FILED
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No. 93 1406

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NICHOLAS P. MIHNOVETS,

Petitioner.

v.

SHARON ARNOLD MIHNOVETS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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50pp

QUESTIONS PRESENTED

1. Whether the automatic reduction of the Petitioner's military pension pursuant to 5 U.S.C. §553 (the "Dual Compensation Act") upon his retirement from the United States Army and his employment by the United States Department of Defense constitute an act taken by the Petitioner to defeat the Respondent's right to share in the monthly military retired pay in the full amount provided for by the parties' Property Settlement Agreement?

2. Does the state court have the authority to award the Respondent a percentage of the Petitioner's military retired pay greater than fifty percent (50%) maximum disposable retired or retainer pay provided in 10 U.S.C. 1408

("The Uniformed Services Former Spouses' Protection Act")?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Supreme Court of Virginia.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICHOLAS P. MIHNOVETS,

Petitioner.

v.

SHARON ARNOLD MIHNOVETS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF VIRGINIA

Petitioner, NICHOLAS P. MIHNOVETS, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered on the 8th day of December, 1993 in Mihnovets v. Mihnovets, Record No. 931609. That judgement finally denied Petitioner's Original Petition for Appeal of the decision of the Court of Appeals of Virginia. Said Petition

requested the Court to review the decisions of the Circuit Court of Arlington County, Virginia and the Court of Appeals of Virginia.

OPINIONS BELOW

The Supreme Court of Virginia has issued an Order in this case, a copy of which appears in Appendix A to this petition, at page 1A. The Order is unpublished. The opinion of the Court of Appeals of Virginia appears in Appendix B to this Petition, at page 2A. The opinion is unpublished. The letter opinion of the Honorable Alfred D. Swersky, dated June 16, 1992 appears in Appendix C to this Petition, at page 9A.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on December 8, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTES INVOLVED

This case involves 5 U.S.C. 5531 et seq, (the "Dual Compensation Act"). The pertinent portions of the Act are set forth in Appendix D, at page 10A. This case also involves 10 U.S.C. 1408 (the "Uniformed Services Former Spouses' Protection Act"). The pertinent portions of the Act are set forth in Appendix E, at page 13A.

STATEMENT OF THE CASE

NICHOLAS P. MIHNOVETS, Petitioner, and SHARON ARNOLD MIHNOVETS, Respondent, were married on the 2nd day of January, 1965 in Albuquerque, New Mexico. At that time and until June 1, 1990, Nicholas was an active member of the Armed Forces of the United States. One child

was born of the marriage, Alicia Nicole Mihnovets.

On June 29, 1984, the parties separated. On October 8, 1987, they entered into a Property Settlement Agreement (hereafter "PSA"), settling their personal and property rights, and all matters pertaining to the support and maintenance of Alicia Nicole Mihnovets, the minor child of the parties, and Sharon's support and maintenance.

A Decree of Divorce was entered on November 9, 1987, granting Nicholas a divorce on the ground that the parties had lived separate and apart without cohabitation and without interruption for more than one year. The PSA was affirmed, ratified and incorporated into the Decree of Divorce.

Effective June 1, 1990, Nicholas retired from the military. He commenced employment as a civilian for the Department of Defense on May 8, 1990[1]. As a result of his employment with the federal government, his military pension benefits became subject to the provisions of 5 U.S.C. § 5531 et seq. This federal law mandates a reduction in the amount of pension benefits a member of the armed forces is to receive if the member takes a paid position with the federal government upon retirement from the military. As a result of his employment, Nicholas' military retirement benefits were reduced by 36.8 percent. From the date of his retirement, Sharon received forty-five

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[1] Nicholas was technically still a member of the Armed Forces from May 1, 1990, through May 31, 1990 because he used available time during this period.

(45%) of Nicholas' military retired pay as calculated after the triggering of the Dual Compensatory Act until entry of the June 16, 1992 order.

Sharon filed a petition for a rule to show cause on February 24, 1992, in the Circuit Court of Arlington County, Virginia, alleging that Nicholas had failed to abide by the terms of their Property Settlement Agreement, specifically the provisions concerning spousal support, payment of pension benefits and provisions of a life insurance policy for Sharon's benefit.

On March 26, 1992 Nicholas filed a Motion to Reduce Spousal Support pursuant to the PSA, which stated in part:

> [Spousal support is] to be modifiable by a court of competent jurisdiction at such time as the Wife begins to receive her share of the Husband's retirement pay... and

> to remain modifiable thereafter [emphasis in original] upon petition of either party.

In response to his motion, Sharon filed a cross-motion for an increase in spousal support on the April 8th hearing. On April 10, 1992, a hearing was held before the Honorable Alfred D. Swersky sitting as Judge Designate for the Circuit Court for Arlington County, Virginia, on the issues raised in Sharon's petition for a rule to show cause. At the hearing, Sharon argued that because Nicholas took a job with the federal government upon his retirement from the military, and that this action defeated her entitlement to her forty-five percent (45%) share of his retirement, she was entitled to arrearage for the difference between what she had received in retirement benefits and what she would have received if Nicholas had

not undertaken employment with the federal government. She based her argument on that portion of the PSA which states in part:

> The Husband agrees that he will not...take any action so as to defeat Wife's right to share in the monthly retirement pay in the full amount to that which the Husband is entitled....

She requested an award of arrearages from the pension (the difference between the amount of Nicholas' retirement pay had he not been employed by the federal government and the amount he currently receives) and for attorney's fees.

Nicholas brought to the Chancellor's attention the fact that since June 1, 1990 Sharon had received forty-five (45%) of Nicholas' military retired pay. At no time had she claimed that this amount was not the proper amount until she filed her Rule to Show Cause in 1992. Additionally, Nicholas defended his action in taking a

position with the Department of Defense by stating that he has not done anything to defeat her entitlement to forty-five percent (45%) of his pension and he raised the effect of the Dual Compensation Act. Nicholas also argued that the parties' PSA specifically references 10 U.S.C. 1408, the Uniformed Services Spouses Protection Act and makes the division of the military pursuant to that statute. This fact was also brought to the attention of the trial Judge.

Judge Swersky ruled from the bench that an arrearage existed in the payment of the military pension benefits to Sharon and asked each side to submit documentation of the exact amount of the arrearage. He also denied Sharon's motion for attorney's fees and costs. Thereafter the Chancellor issued an opinion letter on

April 27, 1992, stating the amount of arrearages owed from retired pay as $13,117.33, and that because there is legitimate question as to the interpretation of the PSA regarding "these matters", the parties must pay their own attorney's fees. Sharon filed a Motion to Reconsider and for attorney fees, and a hearing was held on May 5, 1992.

At the May 5 hearing, Sharon asked the Court to recalculate the amount of arrearages Nicholas was ordered to pay. Judge Swersky denied this motion. Also at this hearing, Nicholas argued his Motion to Reduce Spousal Support. The Court denied his motion and increased Sharon's spousal support by one hundred dollars ($100) per month. Additionally, the court granted judgment in favor of Sharon for arrearages accumulated from paying her

forty-five percent (45%) of the amount of his pension that he currently receives rather than the amount that he would have received had he not gone to work for the Department of Defense. The total amount of the arrearages awarded was $13,117.33. The court ordered the arrearages to be paid in increments of $500 per month plus interest; and ordered that Nicholas pay $1,000 in attorney fees plus $147.50 in court costs.

Nicholas filed a Motion to Reconsider on June 4, 1992 and a supporting memorandum of law on June 9, 1992. The Memorandum specifically addressed the effect of the Dual Compensation Act, 5 U.S.C. 5531 et seq. and the Uniformed Service Former Spouses' Protection Act, 10 U.S.C. 1408. The chancellor heard argument on June 10, 1992. The chancellor took the

matter under advisement and entered a written order on June 16, 1992 reiterating his findings of May 5, 1992. On July 22, 1992 the Court entered an order denying Nicholas' Motion to Reconsider.

Nicholas timely noted an appeal of right to the Court of Appeals of Virginia. On appeal, Nicholas addressed the automatic nature of the application of the Dual Compensation Act, 5 U.S.C. 5531 et seq. The Court of Appeals of Virginia held that the effect of the reduction of his military retired pay as a consequence of his employment as a civilian with the Department of Defense was an act which diminished his former spouse's full share of his pension. Mihnovets v. Mihnovets, No. 1446-92-4 (Ct.of App. of Va.) Sep. 28, 1993, p. 3. The court also determined that the resulting award of a share of the

military retired pay greater than fifty percent (50%) "does not offend the federal prohibition against a direct assignment of military....pay. Id.

Nicholas timely filed a Petition for Appeal to the Supreme Court of Virginia. In the petition he raised both the automatic effect of the Dual Compensation Act, 5 U.S.C. 5531 et seq., and the prohibition in the Uniformed Services Former Spouses Protection Act, 10 U.S.C. 1408, against an award of more than fifty percent (50%) of the disposable retired or retainer pay. The Supreme Court of Virginia entered an order on December 8, 1993, denying the Petition for Appeal. This Petition for a Writ of Certiorari is taken from that Order.

The issue of the effect of the Dual Compensation Act, 5 U.S.C. 5531 et seq.

was raised at the ore tenus hearing before the trial court at the proceedings on April 10, 1992. The issue was preserved on appeal in the Petitioner's Brief to the Court of Appeals of Virginia, (pps. 1, 12), and in the Petitioner's Petition for Appeal to the Supreme Court of Virginia (pps. 2, 9, 12-17).

The issue of the effect of the Uniform Services Former Spouses' Protection Act, 10 U.S.C. 1408, was also raised at the ore tenus hearing before the trial court on April 10, 1992. The issue was renewed in the Petitioners' Motion to Reconsider. The issue was preserved on appeal in the Petitioner's Brief to the Court of Appeals of Virginia and in the Petitioner's Petition for Appeal to the Supreme Court of Virginia.

ARGUMENT

1. The Virginia courts erred in ruling that the automatic reduction of the Petitioner's military pension pursuant to 5 U.S.C. 5531 et seq, upon his retirement from the United States Army and his employment by the United States Department of Defense constituted an act taken by the Petitioner to defeat the Respondent's right to share in the monthly military retired pay in the full amount provided for by the parties' Property Settlement Agreement.

The issue of division of United States military retired pay has been addressed by the courts of the United States for the last decade and a half. The Supreme Court of the United States addressed the issue when it held in McCarty v. McCarty, 453 U.S. 210(1981),

that federal law preempted state court division of military retirement pay. Id. at 232. Congress passed the Uniform Services Former Spouses' Protection Act (hereinafter the "USFSPA"), 10 U.S.C. 1408, in response to the McCarty decision. The USFSPA governs the method by which state courts can divide military retired pay. Mansell v. Mansell, 490 U.S. 581 (1989). The Supreme Court also held that the direct payment mechanism to a former spouse is limited by the USFSPA by requiring the parties to have been married for ten years or more during which the military spouse performed at least ten years of creditable military service, 10 U.S.C. 1408(d)(2), and by preventing payments that exceed fifty percent (50%) of disposable retired or retainer pay, 10 U.S.C. 1408(e)(1).

By the terms of the PSA, Sharon is entitled to forty-five percent (45%) of Nicholas' military retirement pursuant to the USFSPA. Prior to the effective date of his retirement from the military in June, 1990, Nicholas began working for the Department of Defense. As a result of his employment with the federal government, his military pension became subject to 5 U.S.C. §§ 5531 and 5532, the Dual Compensation Act. By operation of this federal law, a retired officer must waive a portion of his military retired pay as a condition of his or her employment with the federal government. This waiver of retired pay can only be avoided by an act of the Director of the Office of Personnel Management in very specific instances. 5 U.S.C. 5533. Unfortunately, Nicholas' circumstances do not warrant such action.

As a result of this, the amount of the monthly total gross retired pay received by Nicholas was reduced from the time he began working for the federal government. Thus, the amount he was eligible to collect was the amount that he received at the time he received his first retirement check. This amount is what was used to calculate Sharon's forty-five percent (45%) entitlement under the PSA, from June 1, 1990 until the trial court rendered its judgment.

This Court held in the Mansell case that under the USFSPA's

> ...plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property. Id., at 589.

The Court further held in Mansell that the USFSPA

> ...does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans disability benefits. Id., at 595.

Here the state courts have treated the same type of waived retired pay as marital property. 10 U.S.C. 1408(a)(4) exempts both pay waived because of disability and dual compensation.

In Mansell, the parties had entered into a property settlement agreement, which provided that the husband would pay the wife fifty percent (50%) of his total military retirement pay, including the portion that he had waived in order to receive disability benefits. This Court found that the Act did not grant state courts the authority to treat total

retired pay as property divisible upon divorce. Id.

The Mihnovets PSA in this case specifically references the USFSPA:

> Upon retirement from the military, the Husband shall assign to the Wife by direct allotment upon Wife's application for same from his U.S. Army retired pay, whether regular retirement or disability pursuant to the Uniform Services Former Spouses' Protection Act, P.L. 97-252, 10 U.S.C. Section 1408, or any other applicable statute, a sum equal to forty-five percent(45%) of the total gross military retirement pay/entitlement per month, (App. 20).

The USFSPA only provides for division of disposable retired pay. 10 U.S.C. 1408(c)(1). By the Supreme Court's holding in Mansell, state courts are preempted from dividing anything other than "disposable retired or retainer pay" as defined in the USFSPA. Id., at 589.

In response to Mansell, the Virginia Court of Appeals held that

> ...parties may use a property settlement agreement to guarantee a certain level of income by providing for alternative payments to compensate for a reduction in payment level based on a reduction in retirement benefits.

Owen v. Owen, 14 Va.App. 623, 626, 419 S.E. 2d 267, 269.

In Owen, the parties had also entered into a property settlement agreement. The agreement provided that spousal support would cease upon the husband's retirement from the military. Id. 14 Va. App. at 626. Upon retirement, the husband applied for and eventually received 60% disability compensation. 14 Va. App. at 625. By his application for and receipt of disability benefits, he was required to waive "...a corresponding amount of his military

retired pay." Mansell v. Mansell, 490 U.S. 581, 583 (1989). Such an election inured to the husband's benefit in Owen.

> Because disability benefits are exempt from federal, state and local taxation,[38 U.S.C.] 3101(a), [now 38 U.S.C. 5301], military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common. Id. at 583-84.

The husband in Owen clearly "acted" in a manner which materially affected his former spouse to her detriment while he benefitted. Spousal support terminated by operation of law by the terms of the PSA, he received 60% of his retired pay as disability compensation making that portion tax-free, and he reduced his former wife's entitlement by one-half the amount of his disability compensation. Clearly, this result was inequitable as

both the trial court and this Court decided. By his retirement and election of disability benefits, the husband received 60% of his pension tax-free, and no longer was required to pay spousal support. He then claimed that his former wife was entitled to one-half of the remaining 40% of his retired pay (the portion not deemed disability).

Here there is no election on the part of Nicholas. He has not overtly acted to "take any action so as to defeat Wife's right to share in the monthly retirement pay in the full amount to that which the Husband is entitled upon retirement as set forth hereinabove..." The waiver of a portion of military retired pay was a loss to Nicholas as he has no recourse to recover these benefits he has lost by law. Compared to Mansell and Owen, Nicholas had

no choice but to waive a portion of his military retired pay when he went to work for the federal government. Federal law cannot now be ignored by ordering him to pay forty-five percent (45%) of an amount he does not receive.

The effect of the Chancellor's ruling is to award Sharon approximately sixty-one percent (61%) of Nicholas' military retired pay and eighty-one percent (81%) of his disposable retired pay. This clearly in conflict with the provisions of the USFSPA and Mansell.

Unlike Owen, Nicholas' guarantee of Sharon's portion of retirement benefit is not in exchange for her waiver of the right to receive spousal support once the husband retired. Owen v. Owen, 14 Va.App. 623, 419 S.E.2d 267 (1992). The Owen court held that:

> If the wife's retirement income decreases because the husband receives disability pay in lieu of retirement, the court may consider this reduction in determining its award and may provide for an alternative payment as compensation for the wife's loss. Id., 14 Va. App. at 627, 419 S.E. 2d at 270.

The Owen Court further held

> The guarantee/indemnification clause of the PSA constitutes consideration for the wife's agreement to waive spousal support. If this clause were found to be invalid, the consideration would fail, and we would be obliged to remand this cause for further proceedings to determine spousal support. Id., at 14 Va. App. at 628, 419 S.E. 2d at 270.

Thus, the proper method to adjust the equities in this case would be spousal support and not by payment of 61% of the military retired pay.

Here the result of the trial court's decision is to penalize Nicholas for seeking employment upon his retirement

from the military. He did not seek an election that inured to his sole benefit as was done in Mansell or Owen. He always paid Sharon forty-five percent (45%) of his retired pay. It is inequitable and unlawful for the trial court's order to stand.

2. The award of the trial court to Sharon effectively gives her sixty-one percent (61%) of Nicholas' pension. This award violates federal law. The Uniformed Services Former Spouse's Pension Act, (USFSPA) 10 U.S.C. 1408, provides the method by which a state court is able to divide a military pension in a divorce action. 10 U.S.C. 1408(a)(B) specifically exempts amounts which are deducted from the retired pay of such member as a result of forfeitures or retired pay ordered by a

court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38; 10 U.S.C. 1408(e)(1) provides that the divorce court not order payment of more than fifty percent (50%) of the disposable retired pay of the military member. The parties specifically referenced the USFSPA in their Property Settlement Agreement. The courts of the Commonwealth are bound by the USFSPA because it is federal law. The supremacy clause of the United States Constitutions states:

> This Constitution, and the Laws of the United States which shall be made in pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S.C. Constitution, Art. VI, cl. 2.

As the USFSPA has not been ruled unconstitutional or repealed or remains a law of the United States. The courts of the Commonwealth are thereby subject to this statute and are circumscribed from deviating from its provisions. The trial court's and the Court of Appeals error must be rectified.

The order of the Supreme Court of Virginia and the decision of the Court of Appeals of Virginia conflict with this Court's decisions in Mansell v. Mansell 490 U.S. 581 (1989).

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Virginia in Mihnovets

v. Mihnovets. In the event that the petition is granted, Petitioner prays that the judgment of the Court below be reversed, and that the cause below be remanded.

Respectfully submitted,

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APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 8th day of December, 1993.

Nicholas P. Mihnovets, Appellant,

against Record No. 931609
Court of Appeals No. 1446-92-4

Sharon Arnold Mihnovets, Appellee.

From the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve a substantial constitutional questions as a determinative issue or matters of significant precedential value, the Court dismisses the petition for appeal filed in the above-style case.

Code §17-116.07(A)(3) and (B).

A Copy,

Teste:

APPENDIX B

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Bray and Fitzpatrick
Argued at Alexandria, Virginia

NICHOLAS P. MIHNOVETS

v. Record No. 146-92-4

SHARON ARNOLD MIHNOVETS

MEMORANDUM OPINION BY JUDGE RICHARD S. BRAY
SEPTEMBER 28, 1993

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Alfred D. Swersky, Judge

Edward V. O'Connor, Jr. (Lewis, Dack, Paradiso, O'Connor & Good, on brief), for appellant.

Gwendolyn Jo M. Carlberg, for appellee.

Nicholas P. Mihnovets (husband) and Sharon Arnold Mihnovets (wife) were divorced in 1987 by a final decree which "affirmed, ratified and incorporated" the

"Property Settlement Agreement" (agreement) of the parties. Several years thereafter, a dispute arose with respect to certain provisions of the agreement. The trial court, acting on petitions of both parties, ordered husband to pay wife "an arrearage... in retired pay and spousal support," increased the amount of periodic spousal support payable to wife and awarded wife attorney's fees and costs incidental to the proceedings. Husband appeals, complaining that the court erroneously construed the agreement and abused its discretion in denying his request to reduce spousal support and awarding wife the foregoing relief.

The parties are fully conversant with the substantial record in the cause, and a reduction of the facts is unnecessary to this memorandum opinion.

It is well established that property settlement agreements incidental to divorce proceedings are subject to "the same rules of interpretation applicable to contracts generally." Tiffany v. Tiffany, 1 Va. App. 11, 15, 332 S.E.2d 796, 799 (1985). "A contract must be construed as a whole to determine the parties' intent with respect to specific provisions." Hooper v. Musolino, 234 Va. 558, 569, 364 S.E.2d 207, 212, cert. denied, 488 U.S. 823 (1988).

> When the terms of a disputed provision are clear and definite, it is axiomatic that they are to be applied according to their ordinary meaning. When there is no ambiguity in the terms of a contract, we must construe it is written, and ...not...search for the meaning...beyond the pertinent instrument itself.

Smith v. Smith, 3 Va. App. 510, 514, 351 S.E.2d 593, 595-96 (1986) (citations

omitted); see also Frey v. Frey, 14 Va. App. 270, 275, 416, S.E.2d 40, 43 (1992). Ambiguity "Exists when language admits of being understood in more than one way or refers to two or more things at the same time." Smith, 3 Va. App. at 513, 351 S.E.2d at 595 (quoting Renner Plumbing v. Renner, 225 Va. 508, 515, 303 S.E,2d 894, 898 (1983)).

Guided by these principles, we find that the trial judge correctly concluded that "there's [nothing] ambiguous about" the agreement of the parties. Under such circumstances, its "meaning and effects are questions of law," reviewable by this Court on appeal. Tiffany, 1 Va. App. at 15, 332 S.E.2d at 799; see also Smith, 3 Va. App. at 513, 351 S.E.2d at 595. We also agree that the provisions in issue "clearly...says that the wife is entitled

to the payment...of a full share...in the full amount" of pension due husband upon his retirement. Should husband act to diminish such "full share" by a reduction of the "full amount" of his pension, the agreement further provides that he must "indemnify" and "hold [wife] harmless" from any resulting loss. Thus, the arrearages and retirement-related award simply recognized and enforced the parties' "agreement to guarantee a certain level of income" to the wife, with "alternate payments to compensate for...reduction in retirement benefits. Owen v. Owen, 14 Va. App. 623, 626, 419 S.E.2d 267, 269 (1992). Contrary to husband's contention, this "arrangement does not offend the federal prohibition against a direct assignment of

military...pay." Id.; see 10 U.S.C. §1408.

With respect to spousal support, the agreement expressly contemplated judicial modifications of the original award "at such time as the wife begins to receive her share of the husband's retirement pay." Assuming, without deciding, that it was also necessary for wife to prove a "material change in circumstances" to justify modification, we find ample support in the record for the trial court's decision to increase the award to the amount ordered, and it will not be "disturbed on appeal." Schoenwetter v. Schoenwetter, 8 Va. App. 601, 605, 383 S.E.2d, 28, 30 (1989); Barnes v. Barnes, ___ Va. App. ___, ___, 428 S.E.2d 294, 298 (1993); Code § 20-109.

Similarly, "[a]n award of attorney's fees is a matter submitted to the trial court's sound discretion and is reviewable on appeal for an abuse of discretion." Graves v. Graves, 4 Va. App. 326, 333, 357 S.E.2d 554, 558 (1987) (citation omitted). It is a decision which must be "based upon the circumstances of the parties." Barnes, ___ Va. App. at __, 428 S.E.2d at 300. Here, the agreement provided for an award of fees and costs under specified circumstances deemed extant by the trial court, and this finding and the related award are well supported by the evidence.

Accordingly, the judgment of the trial court if affirmed.

Affirmed.

APPENDIX C

June 16, 1992

A. Strode Brent, Jr., Esquire
10513 Judicial Drive, Suite 300
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Gwendolyn Jo M. Carlberg, Esquire
420 South Washington Street
Alexandria, Virginia 22314

Re: Mihnovets v. Mihnovets
Arlington County Circuit Court
Chancery No. 36455

Dear Counsel:

Complainant's Motion to Reconsider is denied. The holding of the United States Supreme Court in Mansell v. Mansell, 109 Sup. Ct. 2023 (1989), does not prevent the parties from agreeing to the disposition of a portion of military retired pay now claimed by Complainant to be exempt in this case.

I have this date signed the Decree submitted by Ms. Carlberg and returned the file to Arlington. Ms. Carlberg should prepare a decree denying this motion.

Very truly yours,

Alfred D. Swersky

APPENDIX D

5 U.S.C. 5531

For the purpose of sections 5532 and 5533 of this title--

(1) "member" has the meaning given such term by section 101 (23) of title 37;

(2) "position" means a civilian office or position(including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia; and

(3) "retired or retainer pay" means retired pay as defined in section 8311(3) of this title, determined without regard to subparagraphs (B) through (D) of such section 8311(3); except that such term

does not include an annuity payable to an eligible beneficiary of a member or former member of a uniformed service under chapter 73 of title 10.

5 U.S.C. 5532

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retainer pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retainer pay under this subsection, the amount of $2000 shall be

increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retainer pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

(a)(4) The term "disposable retired pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which-

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter

computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member;s name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

Supreme Court, U.S.
FILED
APR 11 1994
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No. 93-1406

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NICHOLAS P. MIHNOVETS,

Petitioner,

v.

SHARON ARNOLD MIHNOVETS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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No. 93-1406

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NICHOLAS P. MIHNOVETS,

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v.

SHARON ARNOLD MIHNOVETS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondent, SHARON ARNOLD MIHNOVETS, files this BRIEF IN OPPOSITION and prays that the PETITION FOR A WRIT OF CERTIORARI be denied.

OPINIONS BELOW

In addition to the Order of the Supreme Court of Virginia of December 8, 1993, the Order of the Court of Appeals of Virginia of September 28, 1993, the letter opinion of the Honorable Alfred D. Swersky, and the

Order of the Circuit Court of Arlington County of July 22, 1992 denying reconsideration, there is the Order of the Circuit Court of Arlington County entered on June 16, 1992 and also again on July 22, 1982 (27a). This is the Order in which the trial court ruled on the effect of the Property Settlement Agreement of October 8, 1987, awarded arrearages and established the sum equal to forty-five percent (45%) of Nicholas' military gross retirement pay entitlement (GRPE), as well as other matters not pertinent here. These two Orders were appealed. Nicholas did not appeal the denial of his Motion to Reconsider. However, he sets it out in his Brief and, for the first time, argues that the ruling of the trial court that *Mansell v. Mansell*, 109 Sup. Ct. 2023 (1989) does not prevent the parties from agreeing to the disposition of a portion of military retired pay now claimed by Nicholas to be exempt, is incorrect and that he therefore should be granted Certiorari. The ruling by the trial court in its opinion letter of June 16, 1992 and the Order entered on July 22, 1992 pursuant to the opinion letter was not appealed, is not before this Court and should not be the basis for the granting of Certiorari.

JURISDICTION

Nicholas invokes jurisdiction in this Court pursuant to 28 U.S.C. 1257(a) which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United

States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

At no time has the validity of the two statutes cited by Nicholas, i.e., 5 U.S.C. 5531 *et seq.* (the "Dual Compensation Act") and 10 U.S.C. 1408, been drawn into question; this is not a case involving the validity of a statute of the State of Virginia; nor has there been any ruling in the Virginia courts contrary to the Constitution of the United States, specifically, Constitution, Art. VI, Cl 2 (the Supremacy Clause).

This Court held in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), "Federal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question." At page 581, it further held "[s]tate family and family property law must do 'major damage' to clear and substantial federal interests before the Supremacy Clause will demand that state law be overriden."

This case concerns a state court interpreting a property settlement agreement. For these reasons, this Court has no jurisdiction to grant certiorari.

STATEMENT OF THE CASE

In his Statement Of The Case, Nicholas fails to state the reasons this case was brought before the trial court and fails to set out the pertinent clauses of the Property Settlement Agreement.

His statements of fact are misleading. For example, on page 4, paragraph 1 he says the Property Settlement Agreement (hereafter PSA) settled all of the parties' per-

sonal and property rights and also matters of spousal and child support. He omitted to point out that it settled the property rights as to his military gross retirement pay entitlement (hereafter GRPE) and omits to include the pertinent clauses concerning the GRPE. It is his failure to abide by the clauses concerning his GRPE that caused Sharon to file her Rule to Show Cause.

Further, throughout pages 5 through 12, Nicholas refers to Sharon's entitlement to forty-five percent (45%) of his military retired pay and says on page 17, "By the terms of the PSA, the Wife is entitled to forty-five percent (45%) of the Husband's military retirement pursuant to the USFSPA." This is misleading without having the clauses of the PSA set out because the PSA states Sharon's entitlement to be *a sum equal* to 45%.

Further, throughout his Petition, Nicholas implies that the state courts made rulings based on the facts and law. He omits to say all rulings have been based upon the courts' interpretation of the PSA, the agreement of the parties.

It is important to note that this case was brought by Sharon to interpret the PSA and its provisions, not for the trial court to divide property nor to make rulings as to any property rights. All of the property rights had been decided by the parties in the PSA. The trial court made no divisions of property.

The pertinent parts of the PSA concerning the gross military retirement pay entitlement (hereinafter "GRPE") are as follows:

11. HUSBAND'S U.S. ARMY RETIREMENT PENSION.

A. Upon retirement from the military, the Husband shall assign to the Wife by direct allotment upon Wife's application for same from his U.S. Army retired pay, whether regular retirement, disability pursuant to the Uniformed Service Former Spouses' Protection Act, P.L. 97-252, 10 U.S.C. Section 1408, or any other applicable statute, a sum equal to forty-five percent (45%) of the total gross military retirement pay/entitlement per month, payable to the Wife on the first day of the month following the date of the Husband's retirement from the U.S. Army, and the payments will increase as and in the same percentage that the Husband's gross monthly pay/entitlement shall increase. All said payments shall be deemed a property right not subject to termination should the Wife remarry or for any other reason. Should the allotment not meet the obligations of this Agreement or if the allotment shall cease or be interrupted, the Husband shall pay the monies due by certified check to Wife within 7 days of due date.

* * *

D. The Husband agrees that he will not merge his military pension/retirement with any other, nor take any action so as to defeat Wife's right to share in the monthly retirement pay in the full amount to that which the Husband is entitled upon retirement as set forth hereinabove, and the Husband agrees to this and agrees to indemnify the Wife against any breach by him and agrees to hold her harmless against any such breach. Thus the payments shall be made to the Wife regardless of whether the Husband merges his retirement with any other retirement, including civil service, at the same rate and amount which would have been paid to the Wife in the absence of such merger (9a).

Until May, 1990, Nicholas received his salary as a Colonel in the U.S. Army (43a). Effective June 1, 1990, Nicholas retired from the military. He received a statement from the Army (Jumps – Army Retired Annuitant Pay Statement) (43a) showing under Number 1, "Entitlement", that his GRPE effective June, 1990 was $2,576.00. There were no reductions of entitlement listed under Number 2, "Reductions of Ent". Therefore, on June 1, 1990, Sharon was entitled to receive a sum equal to forty-five percent (45%) of the GRPE of $2,576.00, which forty-five percent (45%) amount was $1,159.20. Nicholas paid only $860.00.

Sometime after June 1, 1990 and after the vesting of Sharon's sum equal to forty-five percent (45%) of the GRPE, Nicholas went to work for the Department of Defense as a civilian. As a result of his voluntary employment with the Federal Government, his military pension benefits were reduced. From June, 1990 until the present, Sharon has never received the correct amount of her portion of the GRPE as set out in the PSA.

Nicholas failed to abide by the Final Decree (20a, 21a, 22a) and Sharon filed a Rule to Show Cause. She relied upon paragraph 11D of the PSA which says that Nicholas would not

> take any action so as to defeat Wife's right to share in the monthly retirement pay in the full amount to that which the Husband is entitled upon retirement as set forth hereinabove, and the Husband agrees to this and agrees to indemnify the Wife against any breach by him and agrees to hold her harmless against any such breach . . . (8a, 9a).

An opinion letter was issued by Judge Swersky on April 27, 1992 granting Sharon $13,117.33 in arrearages.

From the favorable rulings by the trial court of June 16, 1992 and July 22, 1992; the favorable decision of the Virginia Court of Appeals of September 28, 1993; and the dismissal of Nicholas' Petition for appeal to the Supreme Court of Virginia of December 8, 1993, in which the Virginia Supreme Court found the decision of the Court of Appeals did not involve a substantial constitutional question as a determinative issue or matters of significant precedential value, Nicholas brings this Petition for a Writ of Certiorari.

ARGUMENT

I.

THE VIRGINIA COURTS DID NOT ERR IN RULING THAT THE PSA PROVIDED FOR A SUM EQUAL TO FORTY-FIVE PERCENT (45%) OF NICHOLAS' GRPE.

It is well-established law of the Commonwealth of Virginia that an appellate court must accept a factual determination of the chancellor if there is credible evidence to support it. Michie's Jurisprudence, Appeal and Error, §277 pp. 447-448.

In particular, the chancellor's findings which are based upon the credibility of oral testimony, and the weight to be given that testimony, must be accorded the same dignity as a jury verdict, i.e., they may not be disturbed unless plainly wrong. *Id.*, §278, pp. 450-451. *Box v. Talley,* 1 Va. App. 289, 338 S.E.2d 349 (1986). The sound reason for this rule is the appellate court's lack of the opportunity to weigh the testimony of a witness first hand, as the trial judge is able to do. *Greenspan v. Osheroff,* 232 Va. 388, 351 S.E.2d 28 (1986). This rule

was reaffirmed by the Court of Appeals in *Venable v. Venable*, 2 Va. App. 178, 342 S.E.2d 646 (1986).

On appeal, the burden is upon the appellant to demonstrate the wrongness of the trial judge's factual determinations. *Abney v. Warden, Mecklenburg Correctional Center*, 1 Va. App. 26, 332 S.E.2d 802 (1985). The record is examined in the light most favorable to the prevailing party. *Carter v. Carter*, 223 Va. 505, 291 S.E.2d 218 (1982).

In the case at bar, the trial court looked at the language of the PSA and ordered that, despite Nicholas' actions sometime after the effective date of his retirement, Sharon was entitled to the amount which she was to have received on June 1, 1990. Nicholas' actions after that time should not have affected her amount as the parties took this possibility into consideration and Nicholas agreed to hold Sharon harmless from such actions on his part (8a, 9a).

The law in Virginia, which is established by statute in §20-109, Code of Virginia, 1950, as amended, and by case law in the numerous cases on point, provides that where a PSA is filed before the entry of the Final Decree, no decree or order, monetary or non-monetary, shall be entered except in accordance with the PSA. *Westbrook v. Westbrook*, 5 Va. App. 446, 364 S.E.2d 523 (1988).

Virginia courts recognize that PSA's entered into by competent parties upon valid consideration for lawful purposes are favored in the law and will be enforced unless their illegality is clear and certain. *Parra v. Parra*, 1 Va. App. 118, 128, 336 S.E.2d 157 (1985), *quoting Cooley v. Cooley*, 220 Va. 749, 752, 263 S.E.2d 49, 52

(1980). Here there is no claim of illegality; therefore, the terms of the PSA are to be enforced.

It is the function of the court to construe the contract made by the parties, not to make a new contract for them. The court cannot read into the contract language which will add to or take away from the meaning of the words contained therein. The guiding light in interpreting the contract is the intention of the parties themselves as expressed by them in the words they have used. *Hederick v. Hederick,* 3 Va. App. at 455; *Smith v. Smith,* 3 Va. App. at 518; *Wilson v. Holyfield,* 227 Va. 184, 187, 313 S.E.2d 396, 399 (1984); *Tiffany v. Tiffany,* 1 Va. App. at 16; *Great Falls Hardware Company of Reston v. South Lakes Village Center Associates,* 238 Va. at 126. This is especially true here where Nicholas agreed to hold Sharon harmless from any actions which he might take to reduce her amount of the retirement as set out in Paragraph 11 D of the PSA.

In its decision in the case at bar, the Court of Appeals states that, in making its findings that the trial judge was correct in finding that there is nothing ambiguous about the agreement of the parties, it is guided by the principles set out in the case of *Hooper v. Musolino,* 234 Va. 558, 569, 364 S.E.2d 207, 212, *cert. denied* 488 U.S. 823 (1988) and in *Smith,* 3 Va. App. at 513 (quoting *Renner Plumbing v. Renner,* 225 Va. 508, 515, 303 S.E.2d 894, 898 (1983). *Mihnovets v. Mihnovets,* ___ Va. App. ___ , ___ S.E.2d ___ , Record No. 1446-92-4, September 28, 1993 at 2.

The principles set out by the Virginia Supreme Court in *Hooper* and *Renner* were followed by the Court of Appeals in its holding that the trial judge correctly concluded that there is nothing ambiguous about the

agreement of the parties and, therefore, its meanings and effect are questions of law reviewable by the Court of Appeals as such. *Tiffany*, 1 Va. App. at 115, 332 S.E.2d at 799; *Mihnovets*, at 2. This Court can only review questions of law if they have been erroneously applied. This is not the case here, in fact the law is wholly in favor of the PSA being upheld and followed.

"The tendency of the court is to give to contracts life and virility of their fair intendment – not to destroy them." *Jennings v. Jennings*, 12 Va. App. 1187, 409 S.E.2d 8 (1991), (*quoting Kiser v. Amalgamated Clothing Workers of America*, 169 Va. 574, 590, 194 S.E. 727, 733 (1938)). In so construing PSA's, the courts consider the wording by looking to the four corners of the contract itself, and looking no further. *Wilson v. Holyfield*, 227 Va. at 187; *Harris v. Woodrum, supra; Tiffany v. Tiffany, supra; Hederick v. Hederick, supra.*

In a PSA, the parties can contract for *any* terms, so long as no illegality is involved. In the absence of incompetency of the parties, and in the absence of fraud or unconscious ability, the PSA must be upheld. *Drewery v. Drewery*, 8 Va. App. 460 (1989); *Derby v. Derby*, 8 Va. App. at 26, 28, 29. Indeed, in *Ward v. Ward*, 239 Va. 1, 387 S.E.2d 460 (1990), where the parties agreed to grant the Wife 100% of the net proceeds from the marital property, this was upheld in the absence of a showing of mutual mistake or fraud, on the grounds that in the PSA parties can agree to any terms they so wish.

In this case, we have a settlement made by the parties, not by a court. A court did not set the amount Sharon was to receive based upon the military pension, the parties did. The trial court merely enforced this clear and unambiguous PSA.

Here, the PSA determined the amount Sharon was to receive based upon the military pension prior to any post retirement employment Nicholas might choose. That amount was fixed at a sum equal to forty-five percent (45%) of the military gross retirement pay entitlement regardless of any further employment Nicholas may have. At the time the PSA was entered into, Nicholas was on active duty in the Army. It was not known then what his future job would be, but regardless of what he might do in the future he agreed to give Sharon a sum equal to forty-five percent (45%) of his GRPE (7a) and indemnify her against any breach (8a, 9a).

In *Owen v. Owen*, 14 Va. App. 623, 419 S.E.2d 267, 1992), the Wife was to receive one-half (½) of the Husband's gross military pension. In the PSA which the parties entered into, the Husband had agreed to indemnify the Wife for any breach in delivering this promised amount. The Husband later waived part of the military pension in order to receive disability benefits. That court found, as did the trial court here, that the PSA involved a guarantee of a certain level of income by providing for alternative payments to compensate for a reduction in the military pension. No source of funds is specified. Even though the Husband stated that his application for disability payments was not an action to default the Wife's interest, the indemnifying clause of the PSA guaranteed a certain level of income. *Owen* stands for the proposition that such reduction shall not defeat the guarantee to the Wife of an amount of income equal to a specified percentage of the military pension.

Nicholas' reliance on *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989) is misplaced since in *Mansell* the California Court of Appeals decided that it was appropriate to reopen the settlement and

reach the federal question as to jurisdiction of the California Court under the Former Spouses Protection Act to treating as community property retirement pay waived to receive veterans' disability benefits. That is not the question in the case at bar, nor does Virginia permit the reopening of a settlement or PSA without a clear and convincing showing of fraud. Here, there is no claim of fraud. *Mansell* is not applicable to this case.

Nicholas argues that the trial court's ruling is in conflict with the provisions of the Uniform Services Former Spouses Protection Act (hereinafter USFSPA), 10 USC §1408, and makes an argument concerning direct pay. However, the issue in this case is not direct pay. The question here, as in *Owen*, is whether parties may use a PSA to guarantee a certain level of income by providing for alternative payments to compensate for a reduction in payment level based upon a reduction in retirement benefits. Here, as in *Owen*, the trial court held that they may have such an agreement and that such an arrangement does not offend the federal prohibition against a direct payment of military pay by property settlement agreement. In *Owen* at 271, the court held, as the trial court did in the case at bar, that the indemnification clause is valid and will be upheld. Clearly the facts in this case, along with the case law, support Sharon's position that the trial court and the Court of Appeals correctly construed the PSA as the parties intended it by holding that she is entitled to an amount equal to forty-five percent (45%) of the GRPE in spite of Nicholas' later actions of obtaining employment which would reduce it, as he had agreed to indemnify her against such reduction. Any other interpretation

would be irrational, render the guarantee meaningless and would not comport with the clear intent expressed by the language of the PSA.

II.

THE VIRGINIA COURTS' AFFIRMATION OF THE DECISION WAS NOT AN AWARD OF SIXTY-ONE PERCENT (61%) OF NICHOLAS' DISPOSABLE RETIRED PAY AND WAS NOT IN VIOLATION OF THE PROVISIONS OF 10 U.S.C. 1408(e)(1).

This is not a case in which the trial judge made an award, division of property or allocation of military retired pay. Further, it is not a case involving the interpretation or validity of 10 U.S.C. 1408(c)(1) under Virginia law. The validity of 10 U.S.C. 1408(c)(1) was not raised at the Court of Appeals level. Also, the supremacy question was not presented to the Court of Appeals. Nicholas would have this Court believe that these issues were previously raised. This is not true. A perusal of the memorandum opinion of the Court of Appeals shows that each and every issue raised was addressed by that court. However, the violation of a federal statute was not a part of any appeal until raised for the first time in the Virginia Supreme Court. The trial court's decision was not an award of any percentage or amount of retired pay. It was a ruling that the parties had an unambiguous PSA; the amount of military gross retired pay to be paid to Sharon was a sum equal to forty-five percent (45%) of Nicholas' GRPE; and that Nicholas agreed to indemnify and hold Sharon harmless if any act by him diminished her share of the retired pay. These were also findings of the Court of Appeals in citing *Owens* (*Mihnovets* at 3).

In his argument at pages 26 and 27, Nicholas says the Uniformed Services Former Spouse's Protection Act provides the method by which a state court is to divide a military pension and that a court cannot order payment of more than fifty percent (50%) of the disposable retired pay. The Court of Appeals, *Mihnovets* at 3, found:

> Contary to Husband's contention, this arrangement [the guarantee to provide Wife with a certain level of income with alternative payments to compensate for reduction in retirement benefits] does not offend the federal prohibition against direct assignment of military pay.

There was no error by the Virginia courts.

Nicholas contends that the USFSPA defines the amount of GRPE to which Sharon is entitled. A close reading of paragraph 11A (7a) shows that the USFSPA defines the type of retired pay and states that upon retirement from the military, Nicholas shall assign to Sharon from his U.S. Army retired pay, whether regular retirement or disability, pursuant to the USFSPA. The PSA does not provide that the amount of the GRPE is to be determined according to the USFSPA, nor is there any reference to the USFSPA in the language defining Sharon's forty-five percent (45%) and how it is to be paid.

The PSA clearly provides that, should the allotment not meet the obligations of the agreement, or if the allotment shall cease or be interrupted, "the Husband shall pay the monies due by certified check to Wife within 7 days of due date." (7a).

Nicholas argues that Sharon never complained about the amount of the pension she received. This argument is irrelevant as Sharon is not bound to a time limit

within which to bring her Rule to Show Cause. Paragraph 24 of the PSA provides:

> . . . The failure of either party to insist upon strict enforcement of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature (14a).

In *Owen*, the Husband contended that the PSA entitled the Wife only to one-half (½) of his military pension, whatever that may be. That is the exact argument Nicholas is making. The court in *Owen* at 270, as the trial court did here, disagreed with the Husband's argument.

In *Owen*, it was found that the guarantee/indemnification clause created a separate agreement between the parties to maintain a certain level of payments to the Wife. The same is true in the case at bar. Further, in *Owen*, Husband acknowledged that he had no disability at the time the PSA was signed. Here, Nicholas was in the Army at the time the PSA was signed and remained in the Army for over 2 more years. Here the trial court found that Nicholas agreed to give Sharon a sum equal to forty-five percent (45%) of his GRPE; agreed to indemnify Sharon in the event of a breach; and that Nicholas had not paid the amounts due to Sharon. Therefore, Nicholas is in arrears $13,117.33 (29a). This arrearage is supported by the evidence and was thus found to be so by the Court of Appeals at 3 (39a).

Nicholas cites the supremacy clause. Sharon agrees that the laws of the United States are the supreme law of the land. However, the validity or supremacy have not been brought into question in this case as the property rights and all issues herein fall within the PSA.

CONCLUSION

WHEREFORE, the Respondent, SHARON ARNOLD MIHNOVETS, prays that the Petitioner, NICHOLAS P. MIHNOVETS', Petition for a Writ of Certiorari be denied and dismissed.

Respectfully submitted,

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APPENDIX

PROPERTY SETTLEMENT AND SUPPORT AGREEMENT

THIS AGREEMENT made by and between NICHOLAS PETER MIHNOVETS, hereinafter referred to as the "Husband," and SHARON ARNOLD MIHNOVETS, hereinafter referred to as the "Wife": to-wit:

WITNESSETH:

WHEREAS, the parties hereto were married to each other on January 2, 1965, in Albuquerque, New Mexico; and

WHEREAS, one child was born to the marriage, *viz.*, ALICIA NICOLE MIHNOVETS, born February 6, 1977; and

WHEREAS, Husband and Wife became separated on or about June 29, 1984, and they have been living separate and apart from each other since said date; and

WHEREAS, it is now the intention of the parties to live separate and apart for the rest of their lives, and they desire to confirm in writing their separation and their agreement on the settlement of all support, property and financial matters and all other rights and obligations growing out of their marriage relationship.

NOW, THEREFORE, in consideration of the premises and agreements herein made, the parties hereto hereby mutually agree as follows:

1. CONSIDERATION. The consideration of this Agreement is the mutual promises and agreements hereinafter contained.

2. SEPARATION. It shall be lawful for each party at all times hereafter to live separate and apart from the other at such place or places as he or she may from time to time deem fit.

3. NO INTERFERENCE. Each party shall be free from interference, authority and control, direct or indirect by the other party. Neither shall endeavor to compel the other to cohabit or dwell with her or him, nor sue, molest or disturb any third party whatsoever for receiving, entertaining, or harboring the other. Each party may, for his or her own separate use and benefit, engage in any employment, business or profession he or she may deem advisable without interference by the other.

4. DIVISION OF PERSONAL PROPERTY. The parties have heretofore divided their tangible personal property to their mutual satisfaction, except as hereinafter referred to. The Husband and Wife shall retain all personal effects which now belongs to each of them respectively, wherever located, as and for his or her own property, free and clear of any claim thereon of whatever nature by either of them against the other. The Husband shall transfer the 1976 Chrysler registered in his name to the Wife upon execution of this Agreement. ~~Husband further agrees to transfer from the United Services Automobile Association (USAA) savings account to the Wife, one half (½) the amount retained in the USAA subscribers savings account, member number 73 18 76 on or before August 15, 1987. Said amount shall be transferred to her USAA member number 277 94 68.~~ The Wife shall have and own, free and clear of any claim by the Husband, all the household furniture and furnishings and all other articles of personal property which are now located at or in the marital home at 2809 South Joyce Street, Arlington, Virginia 22202, provided

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NPM

however the office desk and rifle and pistol and fishing gear shall become the Husband's sole property along with his personal effects. Husband shall collect these items and his personal effects outside the marital home no later than ~~September~~ NOVEMBER 1, 1987 with ten (10) days advance notice to be given the Wife as to date and time of collection.

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5. REAL PROPERTY. Contemporaneous with the execution of this Agreement, Husband shall deed, bargain and convey to the Wife, as and for her sole and separate equitable estate, by general warranty deed, all of his right, title and interest in and to the parcel of real property owned by them as tenants by the entirety, *viz.*, 2809 South Joyce Street, Arlington, Virginia. The Wife shall thereafter have the exclusive right or possession of the said property and she shall be solely responsible for and pay the first trust note, taxes, insurance, utilities and maintenance and all other costs with respect to the property, and she shall hold the Husband harmless and indemnify him as to all of same, and she shall be solely entitled to all rents due on said property. (Husband represents that the only encumbrance is the first trust.) ~~The Wife agrees to assume responsibility for the note now equal to approximately Fifty Three Thousand Dollars ($53,000.00) owed by the Husband to the Wife's mother on the Joyce Street property after the Wife has received her monies in #5A hereinbelow from the sale of the Falls Church rental property as hereinafter stated.~~ The aforesaid deed shall contain language qualifying them for the benefits of Virginia Code Section 58-57 (1950 edition, as amended), the recordation of such deeds shall be at the sole expense of the Wife.

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A. The *parties* will forthwith list for sale the parties' Falls Church, Virginia, house at 2910 Pine Spring Road forthwith, with the Wife to receive the first ~~$21,000.00~~ $21,500.00 with interest at 9½% annually from February 9, 1988 of the net proceeds from the settlement attorney therefrom and the Husband to receive the balance. The Husband will pay all taxes on the monies received from said sale, which monies shall be escrowed for same upon sale. The Husband may, alternative to sale, pay to Wife the sum of ~~$21,000.00~~ $21,500.00 within ~~thirty (30)~~ one hundred twenty (120) days of execution of this Agreement, upon receipt of which Wife will deed this property to the Husband. Until sale, Husband shall pay for all financial obligations on said property timely and when due. The Husband assumes all financial responsibility for any liens on this property from the date of the execution of this Agreement.

B. The Wife shall keep for herself any and all interest in her separate property in West Virginia known as "Trace 1803" or "Arnold", and the Husband shall execute forthwith any and all documents necessary to effectuate this provision.

6. DEBTS. Except as otherwise expressly provided herein and subject to the provisions of this Agreement, each of the parties shall be individually responsible for all of his or her own debts or other obligations. Except as otherwise stated in this Agreement, the Husband specifically agrees to be solely responsible for and pay all the debts incurred by the parties prior to their separation and hold the Wife harmless and indemnify her with respect thereto. Each agrees to not incur any debts or other obligations in the name of the other or pledge the credit of the other, either directly or indirectly, for any goods, merchandise or services whatsoever, and to hold

the other harmless and indemnify the other with respect thereto.

7. CUSTODY OF MINOR CHILD. The Wife shall have the care, custody and control of ALICIA NICOLE MIHNOVETS, the minor child of the parties, with the Husband to have reasonable visitation with her. Neither party shall do anything to estrange the child from the other nor hamper the development of her relationship with both parents. If either party has knowledge of any illness or accident or other circumstances seriously affecting the welfare of the child, he or she shall promptly notify the other of such circumstances. Visitation shall be as set out in the pendente lite order, Arlington Circuit Court, entered on August 2, 1985, and the order entered February 26, 1987, except that summer visitation shall be expanded to two weeks and should the Husband request overnight visitation, provided such visitation would only be if the child agrees, and should the child agree, weekend visitation shall be expanded to include alternate weekends and/or holidays; midweek visitation is cancelled unless agreed by child and father. (If the child desires to stay overnight with the Husband, then in that even weekend visitation shall be from 6:00 p.m. Friday until 8:00 p.m. Sunday on alternate weekends.) ~~The Husband shall not leave the child in the care of any third party during visitation without the Wife's prior approval~~. Provided the Husband has not consumed alcoholic beverages he shall be able to drive with said child.

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Should the parties ever not reside in the same metropolitan area, they agree to seek to negotiate a fair visitation arrangement consistent with such circumstances.

8. SUPPORT OF MINOR CHILD. The Husband shall pay to the Wife as and for the support and maintenance of the said minor child the sum of Eight Hundred Dollars ($800.00) per month. payable on the first day of each month, commencing on the first day of the month following execution of this Agreement, and shall continue thereafter until the child attains ~~nineteen~~ eighteen (18) (~~19~~) years or graduates from high school, whichever is ~~earlier~~ later.

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In addition to the foregoing, the Husband shall pay one-half (½) of all dental, orthodonture and psychiatric/ psychological expenses for the child so long as he is required to pay child support. If possible, the Wife shall use military doctors, dentists, psychiatrists or those covered by CHAMPUS. The Wife shall be responsible for payment of all other medical expenses of the child not provided by any military facility or covered by medical insurance.

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9. SPOUSAL SUPPORT. The Husband forever waives, releases and relinquishes any right or claim he may now have or ever have against the wife for alimony or spousal support or maintenance.

The Husband shall pay to the Wife as and for her spousal support and maintenance, commencing on the first day of the month following execution of this Agreement, the sum of Seven Hundred Dollars ($700.00) per month, payable on the first day of each month, until the Wife's death or remarriage; said sum to be modifiable by a court of competent jurisdiction at such time as the Wife begins to receive her share of the Husband's retirement pay as set out in paragraph ~~10~~ 11 hereinbelow, and to remain modifiable *thereafter* upon petition of either party.

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10. All payments due to the Wife for alimony/spousal support and maintenance child support ~~or any other obligations~~ under this agreement are to be paid by direct allotment to the Wife from the U.S. Government, and Husband shall make and keep current all necessary arrangements forthwith with regard thereto. Should the allotment not meet the obligations of this Agreement or if the allotment shall cease or be interrupted, the Husband shall pay the monies due by certified check to Wife ~~on same due date~~ within 7 days of due date.

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11. HUSBAND'S U.S. ARMY RETIREMENT PENSION.

A. Upon retirement from the military, the Husband shall assign to the Wife by direct allotment upon Wife's application from same from his U.S. Army retired pay, whether regular retirement, disibility [illegible] pursuant to the Uniformed Service Former Spouses' Protection Act, P.L. 97-252, 10 U.S.C. Section 1408, or any other applicable statute, a sum equal to forty-five percent (45%) of the total gross military retirement pay/entitlement per month, payable to the Wife on the first day of the month following the date of the Husband's retirement from the U.S. Army, and the payments will increase as and in the same percentage that the Husband's gross monthly pay/entitlement shall increase. All said payments shall be deemed a property right not subject to termination should the Wife remarry or for any other reason. Should the allotment not meet the obligations of this Agreement or if the allotment shall cease or be interrupted, the Husband shall pay the monies due by certified check to Wife ~~on same due date~~ within 7 days of due date.

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B. The Husband agrees to promptly execute all documents that the United States Army Finance and Accounting Center or any other agency) may require in connection with this paragraph 11, and any other paragraphs that might need him to execute documents.

C. It is agreed that the following shall be sent by the Wife or her attorney to the U.S. Army Finance and Accounting Center, Attention: FINCL-G, Indianapolis, Indiana 46249 (or such other agency having the same authority):

1. A certified copy of this Agreement and of any divorce decree approving the Agreement.

2. A statement by the Wife or her attorney verifying that the divorce decree has not been amended, superseded or set aside.

3. Identifying information on Husband –
Name: Nicholas Peter Mihnovets
Date of Birth: June 24, 1939
Social Security #052-32-5578

4. Identifying information on Wife for mailing purposes –

Name: Sharon Arnold Mihnovets
Address: 2809 South Joyce Street
Arlington, Virginia 22202
Telephone No.: (703) 684-7707
Social Security #585-05-6824

D. The Husband agrees that he will not merge his military pension/retirement with any other, nor take any action so as to defeat Wife's right to share in the monthly retirement pay in the full amount to that which the Husband is entitled upon retirement as set forth hereinabove, and the Husband agrees to this and agrees to indemnify

the Wife against any breach by him and agrees to hold her harmless against any such breach. Thus the payments shall be made to the Wife regardless of whether the Husband merges his retirement with any other retirement, including civil service, at the same rate and amount which would have been paid to the wife in the absence of such merger.

E. The Husband agrees to designate the Wife as the sole primary beneficiary, with an insurable interest in his said pension, of his maximum available Survivor Benefit Plan (SBP), and of his maximum available Retired Survivor Benefit Plan as the same appears in P.L. 92-425 and other applicable statutes, and he shall maintain that

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designation & at the Wife's sole expense so long as the Wife is alive. and so long as wife is willing to pay for the SBP. See page 10a.

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F. The Husband guarantees to the Wife that he will not merge his military pension with any other or take any action which would defeat the Wife's right to the payments of the aforesaid Survivor Benefits after the Husband's death (should he predecease her) and the Husband guarantees this and agrees to indemnify the Wife against any breach by him hereof and agrees to hold her harmless against any such breach.

G. The parties agree that a court of competent jurisdiction in this cause, specifically concerning the rights and privileges of the Wife under the Uniformed Services Former Spouse Protection Act, shall be the Circuit Court of Arlington Virginia, and that the Husband, consents to the jurisdiction of that court.

11. E. i. Provided, however, once the Wife elects to be designated as beneficiary of said Survivors Benefit Plan (SBP), such election shall be irrevocable and if the Wife should, for any reason, cease paying for same after

such election, then the Husband shall have the right to set off the monthly cost of said SBP against either the Wife's alimony, support and maintenance, or the Wife's payments from the Husband's military retirement, as the case may be, provided further that if said retirement payments to the wife cannot be set off by said monthly cost of the SBP due to government regulations, then the Wife shall pay directly to the Husband, each month, the entire monthly cost to the Husband of said SBP.

12. OTHER MILITARY BENEFITS. Husband agrees that he shall at all times promptly take all necessary actions to procure the documents required for the Wife and the child of the parties to obtain and maintain current military identification cards for the use of any commissary, theatre, post exchange medical, dispensary and for all other privileges and benefits to which former spouses and children of military personnel or retired military personnel are entitled.

13. LIFE INSURANCE. The Husband agrees to obtain forthwith and maintain on his life a term insurance policy in the unencumbered amount of $100,000.00. The policy shall be assigned to the Wife as owner and Husband shall make premium payments due thereon. The Husband shall provide Wife with all necessary documentation of said policy.

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and primary beneficiary and daughter Alicia Nicole as secondary beneficiary

14. CHILD'S COLLEGE EDUCATION OR OTHER POST-HIGH SCHOOL TRAINING. The Husband agrees to be solely responsible for and to pay the entire tuition cost and cost of room and board of a four-year college education or other post-high school training for the parties' daughter, ALICIA NICOLE MIHNOVETS, such costs to include, but not be limited to, tuition, books and fees, room and board, not to exceed the cost of same

at the University of Virginia at that time for an in-state student.

15. COMMUNICATION. Until discharged by the other from all obligations pursuant to this Agreement, each party shall keep the other party informed of their current business and resident addresses and telephone numbers, so that both parties are aware as to how they may be in touch with each other at any and all times.

16. TAX RETURNS. Each party states that he or she is not aware of any federal or state audit that is pending on any joint or individual returns. Should any such returns be audited or an amended return be filed, the Husband shall be solely responsible for the payment of any additional taxes, interest and penalties and for the cost, including accountant's fees, associated with such audit or any amended returns and he shall be similarly responsible for joint tax returns hereinbefore filed.

17. COUNSEL FEES AND COURT COSTS. The Husband agrees to pay the Wife toward her counsel fees for the negotiations between them to date, for the preparation of this Agreement and for legal services through and including a final decree of divorce, the sum of ~~Two Thousand Five Hundred Dollars ($2,500.00)~~ One Thousand Five Hundred Dollars (1,500.00), the same to be paid on or before ~~September~~ December 1, 1987. Should either party default in the performance of any provision of this Agreement, the other party shall be entitled to his or her reasonable attorney's fees, court costs and other expenses reasonably necessary to enforce performance. Should either successfully defend any legal action brought by the other party for an alleged breach of this Agreement and the court finds that such action was without substantial merit, then the defending party

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shall be entitled to recover from the moving party his or her reasonable attorney's fees, court costs and other expenses reasonably necessary to defend such action. Both parties agree that no obligations of either party hereto under this Agreement are dischargeable in bankruptcy.

18. MUTUAL RELEASE. Except as otherwise expressly provided herein and subject to the provisions of this Agreement, the parties for themselves and their respective heirs, next-of-kin, personal representatives and assigns, do hereby mutually release, waive, surrender and assign unto the other, his or her heirs, personal representatives and assigns, all claims, demands, actions and causes of action which either of them may have against the other, except any grounds of divorce or cause of action arising out of a breach of this Agreement. Both parties agree that no obligations of either party hereto under this Agreement are dischargeable in bankruptcy.

19. WAIVER OF CLAIMS. Except as otherwise expressly provided herein and subject to the provisions of this Agreement, the parties for themselves and their respective heirs, next-of-kin, personal representatives and assigns, do hereby mutually release, waive, surrender and assign to the other, his or her heirs, personal representatives and assigns all of the right, title and interest and claim which said parties might now have or which they may hereafter have as the husband, wife, widower, widow, next-of-kin, beneficiary, successor or otherwise, in and to any property, real or personal, that either of said parties may own or hereafter acquire; or in respect of which either of said parties has or may hereafter have any right, title, claim or interest, direct or indirect, including but not limited to equitable distribution, curtesy, dower, statutory thirds, halves, community prop-

erty, legal shares, or widow's or widower's rights, or to participate in any of the enjoyment or distribution of any of the real or personal estate of which the other may be possessed at the time of his or her death, any right to receive any legal right or interest whatsoever therein, or to act as the personal representative thereof.

20. RECONCILIATION. No reconciliation of the parties hereto, regardless of duration, and no cohabitation between them of whatever nature, shall nullify or affect in any way the validity as to enforceability of this Agreement or any provision hereof, unless a written Agreement is executed by the parties with the same formality as this Agreement which expressly nullifies or affects this Agreement or any of the provisions hereof.

21. FURTHER INSTRUMENTS AND ASSURANCES. Each party shall timely hereafter take any and all steps and execute acknowledgements and assurances and documents that may be required by the other, or his or her executors, administrators, and assigns, and any others, for the purpose of perfecting clear title to any property referred to in this Agreement and for giving full force and effect to the intent of the covenants, conditions and agreements contained herein.

22. SUBSEQUENT DIVORCE. This Agreement shall not be contingent upon a subsequent divorce between the parties nor shall it be construed as an Agreement to obtain a divorce. In the event any final or *pendente lite* decree by a court of competent jurisdiction is sought by either party in a divorce or separation proceeding, this Agreement shall be disclosed by either party to the court without objection by the other and shall be incorporated in any such judgment or decree; provided, however, that this Agreement shall in any case not be merged in such decree or judgment, and at all times survive any

judgment or decree, and the terms and provisions hereof shall prevail and obtain.

23. DISCLOSURE. This Agreement shall have no binding effect on any property not disclosed by either party hereto one to the other; either party shall be free to petition a court of competent jurisdiction upon discovery of such assets to divide such assets. The party who has failed to disclose asset shall be obligated to the other party for all attorney's fees, court costs and all other expenses incurred in resolving the division of the undisclosed assets.

24. MODIFICATION AND WAIVER. A modification and waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement. The failure of either party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature.

25. BINDING EFFECT. Except as otherwise stated herein all the provisions of this Agreement shall be binding upon the parties hereto and their respective heirs, next-of-kin, executors and administrators.

26. SEVERABILITY. If any of the provisions of this Agreement are held to be invalid or unenforceable, all other provisions hereof shall nevertheless continue in full force and effect.

27. ENTIRE AGREEMENT. The parties have incorporated in this Agreement their entire understanding. No oral statements or prior written matter extrinsic to this Agreement shall have any force or effect. The parties are not relying upon, and specifically herein repudiate any representations other than those expressly set forth

herein. All prior agreements between the parties, whether written or oral, are hereby revoked and held for naught. This is an integrated Agreement.

28. INTERPRETATION. No provisions of this Agreement is to be interpreted for or against any party because that party or that party's legal representative drafted the provision.

29. CAPTIONS. Paragraph titles and captions contained in this Agreement are inserted as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement or any provision hereof.

30. SITUS. This Agreement shall be construed, enforced and governed in accordance with the present laws of the Commonwealth of Virginia and shall be subject to the provisions of Section 20-109 and 20-109.1 of the 1950 Code of Virginia, as amended. Each party acknowledges that he or she has been fully informed as to the legal meaning and effect of said statutes.

31. EFFECTIVE DATE. The effective date of this Agreement shall be the date of its execution.

32. SOLDIERS AND SAILORS RELIEF. The Husband agrees and acknowledges that his rights and privileges under the Soldiers and Sailors Relief Act have been observed, and he waives any objections to this Agreement and to any decrees incorporating same on that basis.

IN WITNESS WHEREOF, the parties have signed and sealed this Agreement and initialed every page as of the day and year written below their respective signatures.

/s/Sharon A. Mihnovets
Date: October 8, 1987

/s/ Nicholas P. Mihnovets
Date: Oct 8 1987

VIRGINIA:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

In Chancery Number 36455

NICHOLAS P. MIHNOVETS

Complainant

vs.

SHARON ARNOLD MIHNOVETS

Defendant

FINAL DECREE OF DIVORCE

THIS CAUSE came on to be heard upon the Bill of Complaint; upon Defendant's Answer and Cross-Bill of Complaint; upon Complainant's Answer to the Cross-Bill of Complaint; upon Decretal Orders entered herein; upon the testimony of Complainant; and his witness duly taken, with due notice to Defendant, in support of his Bill of Complaint, before William E. Artz, Commissioner in Chancery, reduced to writing and filed herein; upon the Report of said Commissioner; and, was argued by Counsel.

UPON CONSIDERATION WHEREOF, and it appearing to the Court, independently of the admissions of either party in the pleadings or otherwise, that said parties were lawfully married on the 2nd day of January, 1965, in Albuquerque, New Mexico; that one child was

born of this marriage, namely Alicia Nicole Mihnovets (born February 6, 1977); that both parties hereto are over the age of eighteen years and that Complainant is a member of the Armed Forces of the United States; that Complainant was, at the time of institution of this suit, an actual bona fide resident and domiciliary of Arlington County, Virginia, and had been an actual bona fide resident and domiciliary of the Commonwealth of Virginia for more than six months immediately preceding the commencement of this suit; that Defendant was, at the time of the institution of this suit, an actual bona fide resident and domiciliary of Arlington County, Virginia, and had been an actual bona fide resident and domiciliary of the Commonwealth of Virginia for more than six months immediately preceding the institution of this suit; that the parties last cohabited in Arlington County, Virginia; that the parties separated on June 29, 1984, at which time it was the intention of the parties to terminate the marriage; that the parties have continued to live separate and apart without any cohabitation and without interruption over since June 29, 1984, a period of more than one year next preceeding the Commissioner's Hearing; and that there has been no reconciliation between the parties, nor, is one probable.

IT FURTHER APPEARING TO THE COURT that the parties hereto have entered into an Agreement dated October 8, 1987, settling their personal and property rights, and all matters pertaining to the support and maintenance of SHARON ARNOLD MIHNOVETS and Alicia Nicole Mihnovets, the minor child of the parties, which agreement is filed herein.

UPON CONSIDERATION OF ALL OF WHICH the Court is of opinion that the Complainant is entitled to

the relief prayed for in his Bill of Complaint; it is therefore

ADJUDGED, ORDERED and DECREED that the said NICHOLAS P. MIHNOVETS be, and he is hereby divorced from the bond of matrimony from SHARON ARNOLD MIHNOVETS which was created by the aforesaid marriage, on the ground of having intentionally lived separate and apart without any cohabitation and without interruption for more than one year, to-wit, ever since June 29, 1984, and that said marriage be, and the same is hereby dissolved; and, it is further

ADJUDGED, ORDERED and DECREED that the Agreement dated October 8, 1987, executed by the parties and filed herein, be, and the same is hereby affirmed, ratified, and incorporated herein by reference pursuant to §20-109.1 of the 1950 Code of Virginia, as amended, and the parties are hereby ORDERED to comply with its terms; including, but not limited to paragraphs 5, 8, 9, 10, 11, 12 and 32, which are as follows:

"5. Real Property. Contemporaneous with the execution of this Agreement, Husband shall deed, bargain and convey to the Wife, as and for her sole and separate equitable estate, by general warrant deed, all of his right, title and interest in and to the parcel of real property owned by them as tenants by the entirety, *viz.*, 2809 South Joyce Street, Arlington, Virginia. The Wife shall thereafter have the exclusive right of possession of the said property and shall shall be solely responsible for and pay the first trust note, taxes, insurance, utilities and maintenance, and the note owed by the Husband to the Wife's parents, and all other costs with respect to the property, and shall hold the Husband harmless and indemnify him as to all of same, and she shall be solely

entitled to all rents due on said property. (Husband represents that the only encumbrance is the first trust.) The aforesaid deed shall contain language qualifying them for the benefits of Virginia Code §58-57 (1950 edition, as amended), the recordation of such deeds shall be at the sole expense of the wife."

"The *parties* will forthwith list for sale the parties' Falls Church, Virginia, house at 2910 Pine Spring Road forthwith, with the Wife to receive the first $21,500.00 of the net proceeds from the settlement attorney therefrom, with interest at 9½% annually from February 9, 1988, and the Husband to receive the balance. The Husband will pay all taxes on the monies received from said sale, which monies shall be escrowed from same upon sale. The Husband may, alternative to sale, pay the Wife the sum of $21,500.00 within one hundred twenty (120) days of execution of this Agreement, upon receipt of which Wife will deed this property to the Husband. Until sale, Husband shall pay for all financial obligations on said property timely and when due. The Husband assumes all financial responsibility for any liens on this property from the date of the execution of this Agreement."

"The Wife shall keep for herself any and all interest in her separate property in West Virginia known as "Tract 1803" or "Arnold", and the Husband shall execute forthwith any and all documents necessary to effectuate this provision."

"10. All payments due to the Wife for alimony/spousal support and maintenance, and child support under this agreement are to be paid by direct allotment to the Wife from the U.S. Government, and Husband shall make and keep current all necessary arrangements forthwith with

regard thereto. Should the allotment not meet the obligations of this Agreement or if the allotment shall cease or be interrupted, the Husband shall pay the monies due by certified check to the Wife within 7 days of due date."

"11. Upon retirement from the military, the Husband shall assign to the Wife, by direct allotment upon Wife, application from same from his U.S. Army retired pay, whether regular retirement or disability, pursuant to the Uniformed Service Former Spouses' Protection Act, P.L. 97-252, 10 U.S.C. Section 1408, or any other applicable statute, a sum equal to forty-five percent (45%) of the total gross military retirement pay/entitlement per month, payable to the Wife on the first day of the month following the date of the Husband's retirement from the U.S. Army, and the payments will increase as and in the same percentage that the Husband's gross monthly pay/entitlement shall increase. All said payments shall be deemed a property right not subject to termination should the Wife remarry or for any other reason. Should the allotment not meet the obligations of this Agreement or if the allotment shall cease or be interrupted, the Husband shall pay the monies due by certified check to Wife within 7 days of due date."

"The Husband agrees to promptly execute all documents that the United States Army Finance and Accounting Center (or any other agency) may require in connection with this paragraph 11, and any other paragraphs that might need him to execute documents."

"It is agreed that the following shall be sent by the Wife or her attorney to the U.S. Army Finance and Accounting Center, Attention: FINCL-G, Indianapolis, Indiana 46249 (or such other agency having the same authority):

"1. A certified copy of this Agreement and of any divorce decree approving the Agreement."

"2. A statement by the Wife or her attorney verifying that the divorce decree has not been amended, superseded or set aside."

"3. Identifying information on Husband:
Name: Nicholas P. Mihnovets
Date of Birth: June 24, 1939
Social Security #052-32-5578"

"4. Identifying information on the Wife for mailing purposes:
Name: Sharon Arnold Mihnovets
Address: 2809 South Joyce Street, Arlington, Virginia 22202
Telephone Number: (703) 684-7707
Social Security #585-05-6824"

"The Husband agrees that he will not merge his military pension/retirement with any other, nor take any action so as to defeat Wife's right to share in the monthly retirement pay in the full amoung to that which the Husband is entitled upon retirement as set forth hereinabove, and the Husband agrees to this and agrees to indemnify the Wife against any breach by him and agrees to hold her harmless against any such breach. Thus the payments shall be made to the Wife regardless of whether the Husband merges his retirement with any other retirement, including civil service, at the same rate and amount which would have been paid to the Wife in the absence of such merger."

"The Husband agrees to designate the Wife as the sole primary beneficiary, with an insurance interest in his said pension, of his maximum available Survivor Benefit Plan (SBP), and of his maximum available Retired Survivor

Benefit Plan as the same appears in P.S. 92-425 and other applicable statutes, and he shall maintain that designation, at the Wife's sole expense, so long as the Wife is alive and so long as the Wife is willing to pay for the Survivor Benefit Plan."

"Provided, however, once the Wife elects to be designated as beneficiary of said Survivors Benefit Plan (SBP), such election shall be irrevocable and if the Wife should, for any reason, cease paying for same after such election, then the Husband shall have the right to set off the monthly cost of said SBP against either the Wife's alimony, support and maintenance, or the Wife's payments from the Husband's military retirement, as the case may be, provided further that if said retirement payments to the Wife cannot be set off by said monthly cost of the SBP due to government regulations, then the Wife shall pay directly to the Husband, each month, the entire monthly cost to the Husband of said SBP."

"The Husband guarantees to the Wife that he will not merge his military pension with any other or take any action which would defeat the Wife's right to the payments of the aforesaid Survivor Benefits after the Husband's death (should he predecease her) and the Husband guarantees this and agrees to indemnify the Wife against any breach by him hereof and agrees to hold her harmless against any such breach."

"The parties agree that a court of competent jurisdiction in this cause, specifically concerning the rights and privileges of the Wife under the Uniformed Services Former Spouse Protection Act, shall be the Circuit Court of Arlington, Virginia, and that the Husband, consents to the jurisdiction of that Court."

"12. The Husband agrees that he shall at all times promptly take all necessary actions to procure the documents required for the Wife and the child of the parties to obtain and maintain current military identification cards for the use of any commissary, theatre, post exchange, medical, dispensary and for all other privileges and benefits to which former spouses and children of military personnel or retired military personnel are entitled."

"32. The Husband agrees and acknowledges that his rights and privileges under the Soldiers and Sailors Relief Act have been observed, and he waives any objections to this Agreement and to any decrees incorporating same on that basis;" and, it is further

ORDERED pursuant to §20-60.3 of the 1950 Code of Virginia, as amended, that in the event the Complainant herein shall become in arrears in payment of support as ordered herein and as provided in paragraphs 8 and 9 of the Separation and Property Settlement Agreement incorporated herein, the same may be withheld pursuant to §20-79.1 of the 1950 Code of Virginia, as amended, from Complainant's earnings as defined in §63.1-250 of the 1950 Code of Virginia, as amended, without further order of this Court, or having to file an application for services with the Department of Social Services.

The following information is furnished pursuant to §20-60.3 of the Code of Virginia, as amended:

a. The name (and date of birth) of the persons to whom a duty of support is owed are: SHARON ARNOLD MIHNOVETS and Alicia Nicole Mihnovets (born February 6, 1977).

b. The Name and Social Security Number of Complainant (the person responsible for the support) is:

NICHOLAS P. MIHNOVETS, Social Security Number 052-32-5578. The Name and Social Security Number of Defendant (the person receiving the support) is: SHARON ARNOLD MIHNOVETS, Social Security Number 585-05-6824.

c. The amount of support ordered herein is as set forth in paragraphs 8 and 9 of the Property Settlement Agreement, incorporated herein, which provide as follows:

"8. The Husband shall pay to the Wife as and for the support and maintenance of said minor child the sum of Eight Hundred Dollars ($800.00) per month, payable on the first day of each month, commencing on the first day of the month following execution of this Agreement, and shall continue thereafter until the child attains eighteen (18) years or graduates from high school, whichever is later."

"9. The Husband shall pay to the Wife as and for her spousal support and maintenance, commencing on the first day of the month following execution of this Agreement, the sum of Seven Hundred Dollars ($700.00) per month, payable on the first day of each month, until the Wife's death or remarriage; said sum to be modifiable by a court of competent jurisdiction at such time as the Wife begins to receive her share of the Husband's retirement pay as set out in paragraph 11 hereinbelow, and to remain modifiable *thereafter* upon petition of either party."

d. The health coverage required to be furnished by Complainant for his dependent is as set forth in paragraph 8 of the Separation and Property Settlement Agreement, incorporated herein, which provides as follows:

"In addition to the foregoing, the Husband shall pay one half (½) of all dental, orthodonture and psychiatric/psychological expenses for the child so long as he is required to pay child support. If possible, the Wife shall use military doctors, dentists, psychiatrists or those covered by CHAMPUS. The Wife shall be responsible for payment of all other medical expenses of the child not provided by any military facility or covered by medical insurance"; and

e. There are no arrearages at this time.

This Order is a final Order from which no appeal will be taken; and, it is further

ORDERED that the Clerk of this Court issue forthwith certified copies of this Decree to counsel for both parties.

AND THIS DECREE IS FINAL.

ENTERED this 9th day of November, 1987.

/s/ Benjamin Kendrick
JUDGE

BETTY A. THOMPSON, LTD.

By: /s/ Marcia M. Maddox
MARCIA M. MADDOX
Counsel for Complainant
1800 North Kent Street
Suite 1001
Arlington, Virginia 22209
Telephone: (703) 522-8100

Seen and objected to:

/s/ Reid Trantz
ILONA FREEDMAN
Counsel for Defendant
649 South Washington Street
Alexandria, Virginia 22314
Telphone: (703) 683-9000

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

IN CHANCERY NO. 36455

NICHOLAS P. MIHNOVETS

Complainant

v.

SHARON ARNOLD MIHNOVETS

Defendant

ORDER

THIS 10th day of April 1992 came the Complainant, NICHOLAS P. MIHNOVETS, in person and with his counsel, A. Strode Brent, Jr., and the Defendant, SHARON ARNOLD MIHNOVETS, in person and with her counsel, Gwendolyn Jo M. Carlberg, upon the Defendant's Rule to Show Cause regarding arrearages in gross retired pay entitlement (GRPE) and Complainant's failure to effectuate direct payment for Defendant's share of said retired pay; arrearages in alimony, spousal support and maintenance and Complainant's failure to effectuate an allotment for his spousal support and child support obligations; Complainant's failure to designate and/or provide proof of designation of the Defendant as his sole, primary beneficiary of his maximum survivor's benefits; Complainant's failure to obtain and maintain a term life insurance policy with

the Defendant owner and primary beneficiary and the minor child as secondary beneficiary; upon the Defendant's Motion for an increase in spousal support, the Defendant's Motion for a payroll deduction for spousal and child support payments and the Complainant's Motion for a decrease in spousal support; and, after hearing testimony, receiving evidence and hearing argument of counsel; upon the letter opinion of April 27, 1992 of the Honorable Alfred D. Swersky, Circuit Court Judge; and the hearing on the 5th day of May, 1992 for which both parties were present

IT APPEARING TO THE COURT that there is an arrearage due on the gross retirement pay entitlement (GRPE) in the amount of THIRTEEN THOUSAND NINE HUNDRED NINETY SEVEN and 32/100 DOLLARS ($13,997.32); and

IT FURTHER APPEARING TO THE COURT that the spousal support calculation shows a credit to the Complainant of EIGHT HUNDRED SEVENTY NINE and 99/100 DOLLRS ($879.99), including credit for a recent payment of SIX HUNDRED TWENTY SIX and NO/100 DOLLARS ($626.00), for a total arrearage of THIRTEEN THOUSAND ONE HUNDRED SEVENTEEN and 33/100 DOLLARS ($13,117.33); and

IT FURTHER APPEARING TO THE COURT that the action which Complainant took in applying for and accepting his current civil service employment reduces the Defendant's monthly amount of Complainant's military retirement pay; and

IT FURTHER APPEARING TO THE COURT that the Complainant is not entitled to two (2) credits for the survivors' benefits costs; and

IT FURTHER APPEARING TO THE COURT that the regulations concerning the stoppage of the allotment are to be submitted to the Court; and

IT FURTHER APPEARING TO THE COURT that, after hearing the testimonies of both parties and receiving evidence, the Defendant has demonstrated a need for an increase in alimony, spousal support and maintenance; it is, therefore

ADJUDGED, ORDERED and DECREED that the Defendant is hereby awarded judgment against the Complainant for gross retirement pay entitlement (GRPE) arrearages in the amount of THIRTEEN THOUSAND ONE HUNDRED SEVENTEEN and 33/100 DOLLARS ($13,117.33) which shall be paid in increments of FIVE HUNDRED and NO/100 DOLLARS ($500.00) per month beginning May 1, 1992, with interest at the rate according to law beginning May 1, 1992, and continuing on the first (1st) day of each and every month thereafter until said arrearages and all interest thereon are paid in full; and, it is further

ADJUDGED, ORDERED and DECREED that the Complainant shall take out an allotment for the military retired pay to the extent he is able to do so. Said allotment shall not be changed by the Complainant without further Order of this Court and any and all amounts owed to the Defendant which are not covered by said allotment are to be paid directly to the Defendant by an automatic paytroll deduction of Complainant's wages, if possible. If the automatic payroll deduction is not possible, then the Complainant shall pay Defendant by certified check or money order on the first (1st) day of each and every month and payment is to be sent directly to Defendant; and, it is further

ADJUDGED, ORDERED and DECREED that, upon reconsideration, the Defendant is awarded attorney's fees in the amount of ONE THOUSAND and NO/100 DOLLARS ($1,000.00) and costs in the amount of ONE HUNDRED FORTY SEVEN and NO/100 DOLLARS ($147.00), for a total of ONE THOUSAND ONE HUNDRED FORTY SEVEN and NO/100 DOLLARS to be paid by the Complainant to the Defendant within thirty (30) days of May 5, 1992; and, it is further

ADJUDGED, ORDERED and DECREED that the Complainant's motion for a decrease in spousal support and maintenance is denied; and, it is further

ADJUDGED, ORDERED and DECREED that the Defendant shall be, and she hereby is, awarded an increase of ONE HUNDRED and NO/100 DOLLARS ($100.00) per month for alimony, spousal support and maintenance so that Complainant shall now pay to the Defendant the total amount of EIGHT HUNDRED and NO/100 DOLLARS ($800.00) per month for alimony, spousal support and maintenance. Beginning May 1, 1992 and continuing until further order of this court, the death of either party or the remarriage of wife; and, it is further

ADJUDGED, ORDERED and DECREED that the Defendant is entitled to forty-five (45) percent of Complainant's Military Gross Retirement Pay/Entitlement (GRPE) per month, (pursuant to the Property Settlement Agreement of October 8, 1987 which was affirmed, ratified and incorporated into the Final Decree of Divorce entered on November 9, 1987) which amount at the present time for 1992 is ONE THOUSAND TWO HUNDRED FIFTY FOUR and 60/100 DOLLARS ($1254.60) per

month. It is further ordered that this amount shall increase for Defendant in the same percentage that Complainant's gross monthly retirement pay/entitlement shall increase according to Paragraph 11 of the Property Settlement Agreement of October 8, 1987; and, it is further

ADJUDGED, ORDERED and DECREED that the Soldier's and Sailor's Relief Act does not apply as the Complainant is retired from active duty with the United States Armed Forces.

Pursuant to §20-60.3 of the Code of Virginia 1950, as amended, the following is provided:

1. Support payments in arrears may be withheld as they become due pursuant to §20-79.1 or §20-79.2 of the Code of Virginia 1950, as amended, from earnings as defined in §63.1-250 of the Code of Virginia 1950, as amended, without further amendments of this Order or having to file an application for services with the Department of Social Services.

1a. Support payments in arrears may be withheld pursuant to Chapter 13 (§63.1-249 et seq.) of Title 63.1, as amended, without further amendments to this Order upon application for services with the Department of Social Services.

2. The name of the spouse to whom a duty of alimony, spousal support and maintenance is owed is: SHARON ARNOLD MIHNOVETS, who was born July 25, 1943; whose Social Security Number is 585-05-6824; who currently resides at 2809 South Joyce Street in Arlington, Virginia; and who is currently not employed.

3. The name of the child to whom a duty of support is owed is: Alicia Nicole Mihnovets who was born February 6, 1977.

4. A duty of spousal and child support is owed by the Complainant, NICHOLAS P. MIHNOVETS, whose Social Security Number is 052-32-5578; who was born June 24, 1938; whose current residential address is 8512 Enochs Drive in Lorton, Virginia; and who is currently employed by the United States Government, Department of Defense at 400 Army Navy Dr., Suite 300, Arlington, Virginia 22202.

5. Alimony, spousal support and maintenance shall be paid by the Complainant to the Defendant in the amount of EIGHT HUNDRED and NO/100 DOLLARS ($800.00) per month beginning May 1, 1992 and continuing thereafter on the first (1st) day of each and every month until the death of either party or the remarriage of Wife, whichever occurs first or until further order of court.

6. Child support shall be paid by the Complainant to the Defendant for the support and maintenance of the child in accordance with the schedule set out in the Property Settlement and Support Agreement of October 8, 1987 which is already in effect. Complainant shall pay to the Defendant as and for the support and maintenance of the minor child the sum of EIGHT HUNDRED and NO/100 DOLLARS ($800.00) per month, payable on the first day of each month, commencing on the first day of November, 1987, and shall continue thereafter until the child attains the age of eighteen (18) years and graduates from high school, or attains the age of nineteen (19) years, marries, becomes self supporting or is otherwise emancipated or dies.

7. The Complainant shall provide health care insurance for the child of the parties, to-wit: Alicie Nicole Mihnovets.

8. There are spousal support arrearages at this time; there are further arrearages in retirement pay; and there are arrearages in court-ordered attorney's fees.

9. There is not a current obligation to make child support payments through the Department of Social Services. In the event there is a future obligation to make such payments through the Department of Social Services, the parties shall give each other and the Department of Social Services at least thirty (30) days written notice, in advance, of any change of address.

10. There are separate amounts of support due from the Complainant, EIGHT HUNDRED and NO/100 DOLLARS ($800.00) for alimony spousal support and maintenance and EIGHT HUNDRED and NO/100 DOLLARS ($800.00) for child support and maintenance, and all amounts are paid by the Complainant to the Defendant.

11. In determination of a support obligation, the support obligation as it becomes due and unpaid creates a judgment by operation of law; and, it is further

ADJUDGED, ORDERED and DECREED that this is a qualified domestic relations Order (QDRO) which complies with the Uniformed Services Former Spouses Protection Act in order to enable to Defendant to obtain direct payment of the maximum allowable amount of her forty-five (45) percent marital share of Complainant's gross military retirement pay/entitlement.

ADJUDGED, ORDERED and DECREED that all other terms of the Final Decree of November 9, 1987 and Property Settlement Agreement of October 8, 1987 shall continue to remain in full force and effect except as specifically modified herein.

ENTERED THIS 22 day of July, 1992.

/s/ Alfred D. Swersky
ALFRED D. SWERSKY
Circuit Court Judge

SEEN AND Excepted to as to the Amount
of Attorney's Fees

/s/ Gwendolyn Jo M. Carlberg 7/21/92
GWENDOLYN JO M. CARLBERG
Counsel for Defendant
420 South Washington Street
Alexandria, Virginia 22314
703/549-5551
Virginia State Bar Number 593

SEEN AND EXCEPTED TO:

/s/ A. Strode Brent, Jr.
A. Strode Brent, Jr.
Counsel for Complainant
10513 Judicial Drive, Suite 300
Fairfax, Virginia 22030-5114
703/591-0200
Virginia State Bar Number 4575

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

IN CHANCERY NO. 36455

NICHOLAS P. MIHNOVETS

Complainant

v.

SHARON ARNOLD MIHNOVETS

Defendant

ORDER

THIS 10th day of June, 1992 came the Complainant, NICHOLAS P. MIHNOVETS, in person and represented by counsel, A. Strode Brent, Jr., and the Defendant, SHARON ARNOLD MIHNOVETS, in person and represented by counsel, Gwendolyn Jo M. Carlberg, upon the Complainant's motion for a reconsideration; and, upon the memoranda, case law and documentation presented to the Court, and after hearing argument of counsel

IT APPEARING TO THE COURT that the case law in *Mansell v. Mansell,* 109 Sup. Ct. 2023 (1989) does not prevent the parties from agreeing to the disposition of a portion of military retired pay now claimed by Complainant to be exempt in this case; and

IT FURTHER APPEARING TO THE COURT that Complainant's motion to reconsider should be denied; it is, therefore

ADJUDGED, ORDERED and DECREED that Complainant's motion for reconsideration shall be, and it hereby is, denied.

ENTERED THIS 22 day of July, 1992.

/s/ Alfred D. Swersky
ALFRED D. SWERSKY
CIRCUIT COURT JUDGE

SEEN AND EXCEPTED TO:

/s/ A. Strode Brent, Jr.
A. STRODE BRENT, JR.
Counsel for Complainant
10513 Judicial Drive, Suite 300
Fairfax, Virginia 22030-5114
703/591-0200
Virginia State Bar Number 4575

I ASK FOR THIS:

/s/ Gwendolyn Jo M. Carlberg
GWENDOLYN JO M. CARLBERG
Counsel for Defendant
420 South Washington Street
Alexandria, Virginia 22314
703/549-5551
Virginia State Bar Number 593

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Bray and Fitzpatrick
Argued at Alexandria, Virginia

NICHOLAS P. MIHNOVETS

v. Record No. 1446-92-4

SHARON ARNOLD MIHNOVETS

MEMORANDUM OPINION* BY
JUDGE RICHARD S. BRAY
SEPTEMBER 28, 1993

FROM THE CIRCUIT COURT
OF ARLINGTON COUNTY
Alfred D. Swersky, Judge

Edward V. O'Connor, Jr. (Lewis, Dack, Paradiso, O'Connor & Good, on brief), for appellant.

Gwendolyn Jo M. Carlberg, for appellee.

Nicholas P. Mihnovets (husband) and Sharon Arnold Mihnovets (wife) were divorced in 1987 by a final decree which "affirmed, ratified and incorporated" the "Property Settlement Agreement" (agreement) of the parties. Several years thereafter, a dispute arose with respect to certain provisions of the agreement. The trial court, acting on petitions of both parties, ordered husband to pay wife "an arrearage . . . in retired pay and spousal support," increased the amount of periodic spousal sup-

*Pursuant to Code §17-116.010 this opinion is not designated for publication.

port payable to wife and awarded wife attorney's fees and costs incidental to the proceedings. Husband appeals, complaining that the court erroneously construed the agreement and abused its discretion in denying his request to reduce spousal support and awarding wife the foregoing relief.

The parties are fully conversant with the substantial record in the cause, and a recitation of the facts is unnecessary to this memorandum opinion.

It is well established that property settlement agreements incidental to divorce proceedings are subject to "the same rules of interpretation applicable to contracts generally." *Tiffany v. Tiffany,* 1 Va. App. 11, 15, 332 S.E.2d 796, 799 (1985). "A contract must be construed as a whole to determine the parties' intent with respect to specific provisions." *Hooper v. Musolino,* 234 Va. 558, 569, 364 S.E.2d 207, 212, *cert. denied,* 488 U.S. 823 (1988).

> When the terms of a disputed provision are clear and definite, it is axiomatic that they are to be applied according to their ordinary meaning. Where there is no ambiguity in the terms of a contract, we must construe it as written, and . . . not . . . search for the meaning . . . beyond the pertinent instrument itself.

Smith v. Smith, 3 Va. App. 510, 514, 351 S.E.2d 593, 595-96 (1986) (citations omitted); *see also Frey v. Frey,* 14 Va. App. 270, 275, 416 S.E.2d 40, 43 (1992). Ambiguity "exists when language admits of being understood in more than one way or refers to two or more things at the same time." *Smith,* 3 Va. App. at 513, 351 S.E.2d at 595 (quoting *Renner Plumbing v. Renner,* 225 Va. 508, 515, 303 S.E.2d 894, 898 (1983)).

Guided by these principles, we find that the trial judge correctly concluded that "there's [nothing] ambiguous about" the agreement of the parties. Under such circumstances, its "meaning and effect are questions of law," reviewable by this Court on appeal. *Tiffany*, 1 Va. App. at 15, 332 S.E.2d at 799; *see also Smith*, 3 Va. App. at 513, 351 S.E.2d at 595. We also agree that the provision in issue "clearly . . . says that the wife is entitled to the payment . . . of a full share . . . in the full amount" of pension due husband upon his retirement. Should husband act to diminish such "full share" by a reduction of the "full amount" of his pension, the agreement further provides that he must "indemnify" and "hold [wife] harmless" from any resulting loss. Thus, the arrearage and retirement-related award simply recognized and enforced the parties' "agreement to guarantee a certain level of income" to the wife, with "alternative payments to compensate for . . . reduction in retirement benefits." *Owen v. Owen*, 14 Va. App. 623, 626, 419 S.E.2d 267, 269 (1992). Contrary to husband's contention, this "arrangement does not offend the federal prohibition against a direct assignment of military . . . pay." *Id.*; *see* 10 U.S.C. §1408.

With respect to spousal support, the agreement expressly contemplated judicial modification of the original award "at such time as the wife begins to receive her share of the husband's retirement pay." Assuming, without deciding, that it was also necessary for wife to prove a "material change in circumstances" to justify modification, we find ample support in the record for the trial court's decision to increase the award to the amount ordered, and it will not be "disturbed on appeal." *Schoenwetter v. Schoenwetter*, 8 Va. App. 601, 605, 383 S.E.2d 28, 30 (1989); *Barnes v. Barnes*, ___ Va.

App. ___ , ___ , 428 S.E.2d 294, 298 (1992); Code §20-109.

Similarly, "[a]n award of attorney's fees is a matter submitted to the trial court's sound discretion and is reviewable on appeal only for an abuse of discretion." *Graves v. Graves,* 4 Va. App. 326, 333, 357 S.E.2d 554, 558 (1987) (citation omitted). It is a decision which must be "based upon the circumstances of the parties." *Barnes,* ___ Va. App. at ___ , 428 S.E.2d at 300. Here, the agreement provided for an award of fees and costs under specified circumstances deemed extant by the trial court, and this finding and the related award are well supported by the evidence.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 8th *day of* December, 1993.

Nicholas P. Mihnovets, Appellant,

against Record No. 931609
Court of Appeals No. 1446-92-4

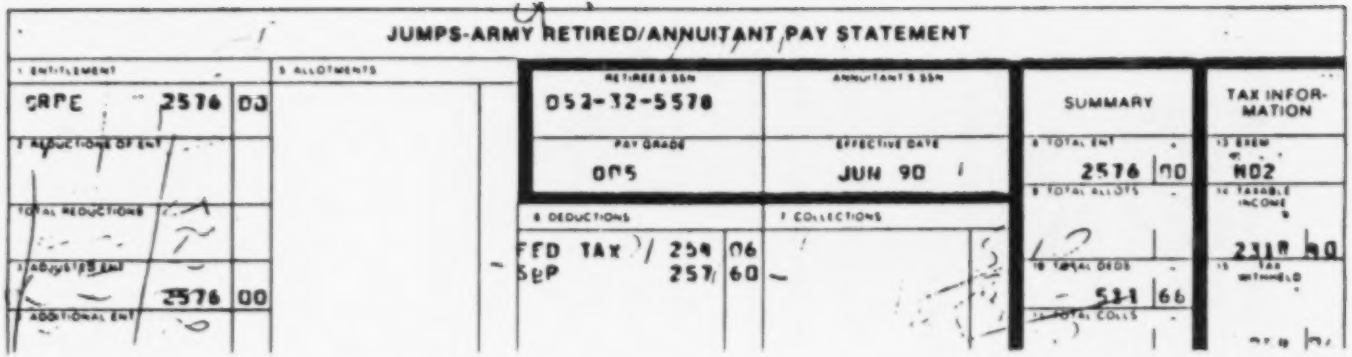
Sharon Arnold Mihnovets, Appellee.

From the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve a substantial constitutional question as a determinative issue or matters of significant precedential value, the Court dismisses the petition for appeal filed in the above-styled case. Code §17-116.07(A)(3) and (B).

A Copy,

Teste:
/s/ David B. Beach
Clerk



JUMPS-ARMY RETIRED/ANNUITANT PAY STATEMENT

1 ENTITLEMENT		5 ALLOTMENTS	RETIREE'S SSN	ANNUITANT'S SSN	SUMMARY	TAX INFORMATION
CRPE 2576	00		052-32-5578		8 TOTAL ENT 2576 00	13 EXEM M02
2 REDUCTIONS OF ENT			PAY GRADE O05	EFFECTIVE DATE JUN 90	9 TOTAL ALLOTS	14 TAXABLE INCOME 2318 50
TOTAL REDUCTIONS			6 DEDUCTIONS	7 COLLECTIONS	10 TOTAL DEDS 531 66	15 TAX WITHHELD
3 ADJUSTED ENT 2576	00		FED TAX 254 06 SGLI 257 60		11 TOTAL COLLS	
4 ADDITIONAL ENT						

BEST AVAILAB

JUMPS ARMY

LEAVE AND EARNINGS STATEMENT

1 NAME (LAST, FIRST, MI)	2 UNIT ID CODE	3 PAY GRADE	4 PERIOD COVERED
MIHNOVETS NICHOLAS P	1P3AAA	O 5	01 MAY 90 - 31 MAY 90

5 SOC SEC NO	NET PAY DUE	SUMMARY
052 32 5578 V	2512.00	9 AMT DROT FWD B3

6 ENTITLEMENTS		7 ALLOTMENT COLLECTIONS			8 OTHER COLLECTIONS		
TYPE	AMOUNT	TYPE		AMOUNT	TYPE	AMOUNT	
BASIC PAY	412260	INS	01	1196	DENIAL INS	78	10 TOTAL ENT 529564
BAS OFF	12392	INS	03	1626	SGLI	400	11 ALLOT COLLS 182897
BAQPD	67860	INS	04	11050	FEDERALTAX	62777	12 OTHER COLLS 95500
VHA	37052	INS	06	4025	FICA TAX	31537	13 NET EARN 251200
		FININ	01	15000			14 END-MO PMT NONE
		FININ	02	150000			15 END MO PMT 251200
TOTALS	529564			182897		55500	16 AMT TO BE DROT FWD NONE

TAX INFORMATION

17 ST & FED INC THIS PERIOD	18 FED INC YEAR TO DATE	19 FED TAX YEAR TO DATE	20 FED EXEM	21 FED ADD TAX WHD	22 FICA WAGE	23 FICA WAGE YEAR TO DATE	24 FICA TAX YEAR TO DATE	25 STATE CODE	26 STATE EXEM	27 ST ADD TAX WHD
412260	2061300	313865	M 2		412260	2061300	157689	NYN	M 2	

STATE TAX

28 STATE INCOME YEAR TO DATE	29 STATE TAX YEAR TO DATE
2061300	

LEAVE INFORMATION

30 DAYS W OH	31 LV EARN	32 LV USED	33 END LV BAL	34 LV LOST	35 EXPD
60	2.0	1	79.0		

ACCRUAL

36 MONTHLY ACCRUAL	37 TOTAL ACCRUAL

DEBT

38 BALANCE DUE U.S.

39 REMARKS

EOT VIRGINIA NATL BK CR 450-1312-6
ALEXANDRIA VA 22310 CS6001011
900426 ABS LV 0001 DAYS 5070865077
900427 DUTY LV
VHA VIA COMPUTED BASED ON ZIP CODE 20310

FINANCE OFFICE INFORMATION

SVC	40 ORDER	41 CONTROL NUMBER	42 SOC	43 SPEC	44 PERIOD	45 BASIC/ALLOT	46 STUB	47 YEAR	48 ETS DATE	49 PAY GR	50 PAY GR/LV BALANCE
C	5077007006		MRN	65060	5641020			25		0J1	96.5

DA FORM 3686-1, JUL 87 Replaces edition of AUG 83 which may be used. For use of this form, see AR 37-104-3; the proponent agency is USAFAC

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IN THE COURT OF APPEALS OF VIRGINIA
AT RICHMOND

Record No. 1446-92-4

NICHOLAS P. MIHNOVETS,

Appellant,

v.

SHARON ARNOLD MIHNOVETS,

Appellee.

APPELLANT'S OPENING BRIEF

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE COURT OF APPEALS:

Appellant NICHOLAS P. MIHNOVETS respectfully represents to this Honorable Court that he is aggrieved by the Decrees of the Circuit Court of the County of Arlington, Virginia entered the 16th day of June, 1992, and the 22nd day of July, 1992 wherein the Court ordered him to increase the amount of pension retirement benefits paid to Appellee after these benefits were reduced by the United States Government pursuant to 5 U.S.C. Section 5531, *et seq.*; and ordered an increase in spousal support.

I. *STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT*

This is an appeal of right pursuant to Section 17-116.05(3)(b) of the 1950 Code of Virginia, as amended. This proceeding originated as a suit for divorce in the Circuit Court of the County

* * *

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Court of Appeals Record No. 1446-92-4

NICHOLAS P. MIHNOVETS,

Appellant,

v.

SHARON ARNOLD MIHNOVETS,

Appellee.

PETITION FOR APPEAL

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT:

Appellant NICHOLAS P. MIHNOVETS respectfully represents to this Honorable Court that he is aggrieved by the Decrees of the Circuit Court of the County of Arlington, Virginia entered the 16th day of June, 1992, and the 22nd day of July, 1992 and the Memorandum Opinion of the Court of Appeals of Virginia dated the 28th day of September wherein the Court ordered him to increase the amount of pension retirement benefits paid to Appellee after these benefits were reduced by the United States Government pursuant to 5 U.S.C. Section 5531, *et seq.*; and ordered an increase in spousal support.

I. *ASSIGNMENTS OF ERROR*

1. The trial court and the Court of Appeals erred in ruling that the wife is entitled to forty-five percent (45%) of the husband's military pension

regardless of the reduction in pension benefits made by the United States Government by operation of law.

* * *